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In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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A. 1. Contrary to appellees' suggestion (Br. 31), we do not contend that an individual's status as a Member of Congress imposes special limitations on his entitlement to judicial relief. A Member who establishes a cognizable personal (*e.g.*, pecuniary) interest in the resolution of a legal issue has standing to sue, even if the opposing party is another governmental official or entity. See Gov't Br. 22 n.11; *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 960 n.2 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985); cf. *United States* v. *Will*, 449 U.S. 200 (1980) (suit by Article III judges challenging statutes affecting their compensation).[1]

[1] Nor is there any basis for appellees' assertions (Br. 18, 31-32) that persons other than Members of Congress would have standing to sue in analogous circumstances. In *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-545 & n.6 (1986), this Court held that an individual school board member lacked standing to appeal from a district

This Court's cases make clear, however, that separation-of-powers principles are directly relevant to the question whether the harms alleged by appellees may be regarded as legally cognizable injuries. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992), the Court rejected the proposition that "the public interest in proper administration of the laws * * * can be converted into an individual right by a statute that denominates it as such." The Court explained:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.

Id. at 577. A statute that defined Executive Branch noncompliance with the Constitution and laws as a judicially cognizable injury to Congress or its Members would be

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court judgment entered against the board. Despite the fact that the district court had declared a decision of the board to be unconstitutional, see *id.* at 537-539, the Court concluded that the member "ha[d] no personal stake in the outcome of the litigation," *id.* at 543-544. *Bender* cannot be reconciled with appellees' contention (Br. 18) that "members of any other occupation" would have standing to challenge "a statute [that] unconstitutionally altered the legal consequences of a core occupational activity." To the contrary, *Bender* makes clear that an individual whose "core occupational activity" is participation in a *collective* decision-making process typically lacks a judicially cognizable interest in vindicating the decision of the body as a whole. In any event, appellees do not have just "any other occupation." They sue as Members of one Branch of a Government established by a Constitution that rests on a system of separated powers in order to secure personal liberty (see Gov't Br. 24) and prescribes a limited role for Article III courts in their relation to the political Branches.

subject to even more pressing constitutional objections.[2] Such a statute would not only expand the role of the courts beyond their proper sphere; it would vest Congress with a substantial institutional role in the execution of the laws, in violation of fundamental separation-of-powers principles. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986) ("once Congress makes its choice in enacting legislation, its participation ends"); Gov't Br. 25-26.

Indeed, this suit is far removed from an exercise of the "judicial Power" and the resolution of "Cases" and "Controversies" as the Framers understood those terms. See, *e.g.*, Speech of the Honourable John Marshall to the House of Representatives, 18 U.S. (5 Wheat.) App. 3, 16 ("A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution * * * the other departments would be swallowed up by the judiciary."); *Muskrat* v. *United States*, 219 U.S. 346, 356-357 (1911). Appellees seek a ruling by an Article III court, not as a forum of "last resort," *Valley Forge Christian College* v. *Americans United for Sepa-*

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[2] Section 3(a)(1) of the Line Item Veto Act authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Contrary to appellees' contention (Br. 32), Section 3(a)(1) does not reflect an affirmative congressional determination that individual Members have Article III standing to challenge the Act. Rather, it is properly understood as eliminating prudential barriers to Members' suits. In *Bennett* v. *Spear*, 117 S. Ct. 1154 (1997), this Court considered a statutory provision authorizing "any person" to bring suit to enforce the Endangered Species Act. In considering whether the plaintiffs had standing under Article III, the Court did not give weight to any supposed congressional determination that *all* persons would have standing to sue. The Court instead construed the citizen-suit provision to expand standing to the full extent permitted by Article III. See *id.* at 1162-1163.

ration of Church & State, Inc., 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), for redress of personal injuries, but rather as a sort of council of revision within the Government to nullify an Act of Congress before it has any operative effect—a mechanism specifically rejected by the Framers. See *United States* v. *Richardson*, 418 U.S. 166, 189-191 n.9 (1974) (Powell, J., concurring); Gov't Br. 32-33. And a dispute solely between the political Branches is not one whose "adjudication is consistent with the system of separated powers" or "traditionally thought to be capable of resolution through the judicial process." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984) (internal quotation marks omitted) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)). Compare *Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum").

2. Appellees deny that they are "merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest)," claiming instead to have "alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of legislation." Appellee Br. 31, 24. The Line Item Veto Act, however, places no constraints on the right of appellees to vote on proposed legislation. Nor does the Act affect the manner in which votes are counted. Despite their efforts to gainsay the fact, appellees' suit is in every meaningful respect an attack on the manner in which future appropriations laws will be implemented *after* they are enacted.

That would be true, we emphasize, even if (as appellees contend) a cancellation under the Act constituted an impermissible partial "repeal" of an appropriations law. In that event, the President's refusal to spend the appropriated funds would violate his obligation to execute the particular appropriations law in accordance with its terms. The same would be true, however, if the President refused to spend funds based on the mistaken belief that the underlying appropriations law was permissive rather than mandatory. See *Train* v. *City of New York*, 420 U.S. 35 (1975); Gov't Br. 6-7. In either circumstance, the President's unlawful failure to spend the appropriated funds would be subject to challenge by a plaintiff whose pecuniary interests were adversely affected (see Gov't Br. 19-20); but neither form of Executive Branch illegality would threaten appellees' right to vote or otherwise impair their ability to discharge their legislative duties.

Appellees assert (Br. 24) that the Line Item Veto Act "changes the legal effect of Members' votes on spending and tax bills" and "deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it *becomes operative as law*" (emphasis added). The precise meaning of the italicized language is left unclear. Appellees plainly do *not* contend, however, that cancellation under the Act causes appropriations laws to be *enacted* in any form other than that in which they were voted on by Congress. They acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." In stating that the appropriations bill may "become[] operative as law" in some form other than that in which it was voted on, appellees can only mean that the President's cancellation would deprive the bill, *after enactment*, of its operative effect. That contention (whatever its merits) has nothing to do with the lawmaking process; it is simply a challenge

to the (anticipated) execution of (hypothetical) enacted laws.[3]

3. Appellees also contend that the Line Item Veto Act injures them even in advance of any actual cancellation. They assert that the Act "unconstitutionally increases the President's power" by enabling him to utilize the threat of cancellation "to influence Member votes on all matters before Congress." Appellee Br. 24. The Act, however, places no legal constraints on Congress's ability to require the President to spend appropriated funds on specified projects, since Congress retains the power to provide that the Act shall not apply to a particular appropriations law, or to any individual item contained therein. See Gov't Br. 30-31. Appellees (and other individual Members) may attempt to persuade their colleagues to vote to exempt particular appropriations laws, or individual budgetary items, from the cancellation authority vested in the President by the Line Item Veto Act.[4]

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[3] If appellees' arguments were accepted, *any* contention that *any* Executive Branch officer's conduct violates statutory requirements or prohibitions could be recast as a claim that a Member's vote had been nullified or its legal effect altered, or that the statute in question had "become operative as law" in some manner other than that in which it was voted on. If separation-of-powers principles bar Congress from defining noncompliance with federal law as an injury to itself or its Members, that bar cannot be circumvented by recharacterizing such noncompliance as an impairment of the Members' right to vote.

[4] The district court stated that "just because Congress *as a whole* can suspend or repeal the Act, or pass a disapproval bill, does not mean that an *individual* Member's injury is illusory. A Member cannot procure any such relief on his own." J.S. App. 15a. An individual Member's achievement of *any* legislative goal, however, requires the support of a majority of his colleagues. Appellees' inability to effectuate legislative policy unilaterally is neither the result of the Line Item Veto Act nor a judicially cognizable injury.

The Line Item Veto Act simply provides that future appropriations laws will be permissive rather than mandatory unless those future laws state otherwise.[5] Any change in the negotiating process between Congress and the President will result not from the legal force of the Act, but from the (actual or anticipated) unwillingness of other Members of Congress to exempt particular appropriations laws from the Act's coverage. That prospect is insufficient to establish judicially cognizable injury. Cf. *Skaggs* v. *Carle*, 110 F.3d 831, 834-836 (D.C. Cir. 1997) (Members of Congress lacked standing to challenge House Rule requiring three-fifths vote for passage of any federal tax rate increase, since a simple majority could amend or repeal the Rule, or suspend its operation with respect to a particular tax increase).[6]

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[5] Taken in isolation, the Line Item Veto Act has no operative legal effect. The Act is similar, in this respect, to various federal statutory provisions—including other provisions of the Impoundment Control Act—whose sole function is to regulate the construction or implementation of *other* federal laws. See, *e.g.*, 1 U.S.C. 1-6 (Dictionary Act); 1 U.S.C. 108, 109 (effect of statutory repeals); 5 U.S.C. 302(b) (powers vested by law in agency head may be delegated to subordinate officials); 5 U.S.C. 701 *et seq.* (judicial review of agency action); 31 U.S.C. 1301(c) and (d) (rules governing construction of appropriations laws).

[6] In pointing out that the Line Item Veto Act's provisions may be rendered inapplicable to any appropriations law or item contained therein, we do not intend to trivialize the Act's significance. Having chosen (after extensive deliberation and debate) to enact the Line Item Veto Act, Congress may be unlikely to adopt a routine practice of exempting individual appropriations laws from its coverage. The fact remains, however, that the Act can have no effect unless Congress passes *another* law that is not exempted from the Act's terms. The Act's practical effect thus depends entirely on Congress's *continued* adherence to the view that the budgetary discretion it confers on the President represents wise national policy. And even then, the Act will

Appellees' claim that the Act injures them by increasing the President's power during negotiations is flawed in other respects as well. As we explain in our opening brief (at 22-25), Members of Congress exercise their powers on behalf of their constituents and of the public generally, and they have no personal interest in the allocation of power between the Legislative and Executive Branches.[7] Appellees are in an especially poor position to represent the interests of the Legislative Branch, since they challenge the constitutionality of an Act of Congress that has been defended in the district court and this Court by the Senate and House of Representatives as *amici curiae*. And it is implausible to suppose that the *threat* of cancellation could inflict a judicially cognizable injury upon appellees if (as we demonstrate above, see pages 4-6, *supra*) an *actual* cancellation would not.

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have no concrete legal effect unless and until the President exercises his cancellation authority with respect to a particular item.

[7] Appellees' contrary argument is premised almost exclusively (see Appellee Br. 27-28) on *Coleman* v. *Miller*, 307 U.S. 433 (1939). As we explain in our opening brief (at 28-29 n.15), *Coleman* is distinguishable from this case in three significant respects. First, *Coleman* involved state legislators whose asserted interest had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 446. The majority did not dispute the conclusion of four Justices that the plaintiffs "[c]learly * * * would have no standing had [they] brought suit in a federal court." *Id.* at 465 (opinion of Frankfurter, J.). Second, *Coleman* involved an asserted defect in the process by which votes were counted within the state legislature, rather than in the administration of a duly enacted law. Finally, the Court did not hold that any individual member of the Kansas legislature would have had standing, but stated only that at least the twenty senators who voted to defeat the resolution ratifying the proposed constitutional amendment had a sufficient interest. *Id.* at 446.

Finally, the diminution of influence that appellees claim to suffer is not traceable to the defendants in this case. As we explain above, it is within Congress's power to exempt any appropriation from the Act's provisions, and thus to prevent the Act from having any operative legal effect. Whatever the practical likelihood of that occurrence, appellees have made no effort to explain how the named defendants—the Director of the Office of Management and Budget, and the Secretary of the Treasury—could be held responsible for Congress's decision not to do so. Because Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action *of the defendant*, and not injury that results from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added), appellees' allegation of diminished influence within the legislative process would be insufficient to establish the existence of a case or controversy even if such a loss of influence could be said to constitute judicially cognizable injury.

B. 1. In our opening brief, we survey the history of federal appropriations laws from 1789 to the present. For appellees, however, the history of Executive Branch spending discretion begins not in 1789 but in 1974, with the enactment of the Impoundment Control Act (ICA). Appellees' apparent view is that the ICA embodies the limits that the Constitution places on Congress's power to vest spending discretion in the Executive Branch. The Line Item Veto Act, in this account, represents a fall from constitutional grace because (and to the extent that) it departs from the ICA's limitations. See Appellee Br. 4-6, 41.

Appellees' focus on the ICA as a constitutional baseline is profoundly ahistorical. The legislative practice of giving the President substantial discretion over the ex-

penditure of appropriated funds has a 200-year pedigree. See Gov't Br. 2-6; Senate/House Amicus Br. 5-12. On those occasions when Congress has tightened controls on Executive Branch discretion, it has typically aimed at preventing overspending, not underspending. See, *e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).[8]

When seen in its proper historical context, the Line Item Veto Act is noteworthy less for the discretion it grants the President than for the limits it imposes on that discretion. The Act gives the President *less* control over federal spending than, for example, the First Congress conferred when it used lump-sum appropriations "not exceeding" specified amounts to fund the general operations of the federal government. See Gov't Br. 2-3; Senate/House Amicus Br. 5-6. The Act gives the President no authority to revise current levels of entitlement spending, which account for the lion's share of all federal outlays. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see Gov't Br. 9 n.4, 45. With respect to spending items covered by the Act, the President is limited to two choices: to spend the full appropriated amount on the specified item or to use the whole amount to reduce the federal deficit. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a; see Gov't Br. 44. The President must consider a number of

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[8] The Constitution itself reflects a concern with restraining, rather than compelling, expenditures by the Executive Branch. The Appropriations Clause (Art. I, § 9, Cl. 7) prohibits the drawing of money from the Treasury except "in Consequence of Appropriations made by Law." See generally *OPM* v. *Richmond*, 496 U.S. 414 (1990). That Clause was designed in part to ensure that the Executive Branch spends no more than Congress appropriates. See *id.* at 427; *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1851). The Constitution contains no comparable provision aimed at compelling the expenditure of appropriated funds.

statutory criteria in making that choice, ICA §§ 1021(a)(A), 1021(b), 1022(b) (2 U.S.C. 691(a)(A), 691(b), 691a(b)); J.S. App. 33a-34a; he must act within a limited time, ICA § 1021(a)(B) (2 U.S.C. 691(a)(B)); J.S. App. 33a; and he may not reverse course once he has made his decision. And because the President must determine that any cancellation will "reduce the Federal budget deficit," ICA § 1021(a)(A)(i) (2 U.S.C. 691(a)(A)(i)); J.S. App. 33a, he must, as a predicate for exercising his cancellation authority, have a reasonable basis for believing that there continues to be a deficit to reduce. Because the Act leaves the President with significantly less discretion than Congress has chosen to confer in prior spending laws, the historical record weighs heavily in favor of its constitutionality.

Ironically, appellees treat some of the Act's restrictions as a source of constitutional concern. For example, appellees regard it as problematic that the President must exercise his cancellation authority within five days (see Br. 38 n.22) and that he may not unilaterally undo a cancellation (see Br. 40). Those restrictions, however, serve to facilitate planning and prevent disruption of ongoing programs (see Gov't Br. 35-36 n.22; Senate/House Amicus Br. 21); and if the President were free to cancel or restore spending items at any time, he would enjoy far greater "leverage over the lawmaking process" (Appellee Br. 30) than he enjoys under the Act in its existing form.

2. In our opening brief (at 34-35), we explain that the Act does not conflict with the lawmaking procedures of the Presentment Clause because the Act does not come into play until after those procedures have been satisfied. When the President is presented with a spending bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) it in its entirety. When he signs the bill, it becomes a law, and the "finely wrought" lawmaking procedures of the Present-

ment Clause (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) are complete. Appellees acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." Their repeated assertions (Br. 6, 20, 37, 43, 45) that cancellation occurs "in conjunction with" signing cannot obscure the fact, critical to analysis under the Presentment Clause, that the President's cancellation authority arises only *after* he has fully complied with the requirements of the Clause.

Appellees nevertheless contend that the Line Item Veto Act "deliberately contravenes the spirit and purposes of the *in toto* requirement of the Presentment Clause" (Br. 38) because it is functionally indistinguishable from "a statute authorizing the President to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder" (Br. 37-38).[9] That argument is flawed in two respects. First, the Presentment Clause prescribes the "procedure[s]," *Chadha*, 462 U.S. at 951, by which bills are enacted into law. The difference between the Act and appellees' hypothetical statute is the difference between a law that honors those procedures and a law that does not. It is no objection to a law that conforms to the Constitution that the same results could be achieved by a law that did not do so.

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[9] When the President exercises his cancellation authority, the Act's "lockbox" provision permanently reduces the amounts of budgetary resources that Congress may thereafter appropriate in any one fiscal year without triggering a sequester under the Budget Enforcement Act of 1990 (BEA). See Gov't Br. 10 n.6. Under a statute that permitted the President to remove spending items from bills before signing them into law, in contrast, those items would never become law, and the BEA's caps and "paygo" limits would remain unchanged. Appellees are thus incorrect in stating (Br. 38) that "postponement of cancellation until after signing has no real-world consequence whatsoever."

Second, the purpose of the *in toto* requirement is not to restrict Congress's ability to vest the President with discretion in administering the laws. To the contrary, some lawmaking practices that vest extremely broad discretion in the President are unquestionably consistent with the requirement that the President sign or return a bill *in toto*.[10] Rather, the *in toto* requirement protects Congress against presidential usurpation of the lawmaking function by preventing the President from (in effect) creating laws through emendation of bills presented to him. Because the *in toto* requirement serves to ensure that the President remains within the bounds established by Congress—rather than to restrict Congress in deciding what those bounds should be—a decision by Congress itself to confer discretion upon the President cannot be contrary to the "spirit" or "purpose" of that requirement.[11]

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[10] Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might adopt the practice of enacting each line item as a separate bill, which the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

[11] If the President were vested with partial veto power by the *Constitution*, he would indeed have the power to "reshape legislation to produce results that would never have passed Congress." Appellee Br. 12. The exercise of that power would result in laws whose terms had not been approved, and might well have been rejected, by the legislature. See *Bengzon* v. *Secretary of Justice*, 299 U.S. 410, 414 (1937). Because Congress retains the power to render the Line Item Veto Act inapplicable to any particular appropriations law, however, the Act creates no risk of a law whose contents are against the will of Congress. Rather, Congress's passage of an appropriations bill that does not alter the "default rule" (see Gov't Br. 30-31) established by the Act manifests an intent that the President be permitted either to spend, or to impound for deficit reduction purposes, each qualifying item contained therein. See pages 17-18, *infra*; Gov't Br. 50.

3. Because the requirement that the President must sign or return a bill *in toto* places no limitations on Congress's power to vest the Executive Branch with discretion in the execution of federal laws, that power is limited only by the principle that Congress may not delegate legislative power to other officials. See Gov't Br. 40-42. In our opening brief, we show that the restrictions that the Act places on the President's cancellation authority easily satisfy this Court's nondelegation precedents. See *id.* at 44-46; see also pages 10-11, *supra*.

Appellees make virtually no effort to demonstrate that the Act fails to provide "intelligible principle[s]," *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), to guide and cabin the President's discretion. Instead, they assert (Br. 46-49) that Congress may give the Executive Branch discretion over the operation of federal laws in only two situations: "to 'fill up the details' of a legislative scheme" or "to adapt a statutory program to [changing] circumstances." *Id.* at 50. Because they believe that the Act does not fit into either of those categories, appellees assert that it represents an unconstitutional "abdication" (*id.* at 45) of lawmaking power by Congress. Appellees' characterizations of Congress's powers under the Constitution and the President's powers under the Act are both mistaken.

As the Court explained in *Bowles* v. *Willingham*, 321 U.S. 503, 515 (1944), "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority." The reasons why Congress chooses the particular course it does are irrelevant. This Court has recognized, for example, that Executive Branch officials may permissibly be vested with "policymaking responsibilities" when Congress itself is "unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with

the scheme devised by the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). So long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373, it has discharged its lawmaking responsibilities under Article I.[12]

As we explain above, see note 10, *supra*, the President's cancellation authority under the Act is functionally comparable to the power that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting each line item as a separate law. The Act places far greater constraints on the President's discretion than did the lump-sum appropriations laws favored by early Congresses. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of the availability of alternative mechanisms by which the President could be vested with equal or greater authority over the expenditure of federal funds, the Line Item Veto Act cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.[13]

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[12] In attacking the Act on delegation grounds, appellees apparently contend that Congress may confer discretionary authority only when, and to the extent that, such discretion is somehow "necessary" to achieve Congress's goals. This Court has squarely held, however, that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus* v. *United States*, 321 U.S. 414, 425-426 (1944). And the Court has sustained grants of authority that cannot be justified by any such notion of legislative necessity. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737 (1996).

[13] Appellees suggest (Br. 42) that the Line Item Veto Act is constitutionally indistinguishable from a statute giving the President

Moreover, the Act confers authority on the President with respect to matters—the budget and expenditures—in which he has preexisting authority and accumulated expertise based on historical practice, his responsibility for execution of the laws, his superintendence of the Executive Branch, and the assistance of the heads of Departments (see U.S. Const. Art. II, § 2, Cl. 1) and the Director of OMB.[14] This Court has recognized that Congress has especially broad latitude to vest discretionary authority when it is "set within boundaries the President may not exceed" and the President has inde-

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plenary power to strike "unnecessary" provisions from civil rights or other laws. The relevant question in any such case would be whether the law provided "intelligible principles" to guide and cabin the President's discretion. In addition, the Line Item Veto Act does not regulate primary conduct, and it operates in an area where the President has historically been accorded broad authority. See page 16, *infra*.

[14] The Framers anticipated this role for the Executive:

> The administration of government, in its largest sense, comprehends all operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, *the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature*, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

The Federalist No. 72, at 435-436 (Rossiter ed. 1961) (Hamilton) (emphasis added). Congress reinforced the President's central role when it enacted the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, which assigned to the President the responsibility for formulation of a national budget and created a Bureau of the Budget to assist him.

pendent authority over the subject matter. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737, 1750-1751 (1996).

4. Appellees' principal contention is that the President's exercise of cancellation authority under the Act constitutes a statutory "repeal" that must itself conform to the lawmaking requirements of Article I. As we explain in our opening brief (at 46-49), however, Congress has frequently vested the President with the authority to suspend, limit, or otherwise modify the operation of federal laws. As long as Congress provides intelligible standards for the exercise of that authority, the President is exercising not the Article I power to repeal a law, but rather his Article II power to "faithfully execute" the laws. See, *e.g.*, *Intermountain Rate Cases*, 234 U.S. 476 (1914); *Field* v. *Clark*, 143 U.S. 649 (1892).

There is, in particular, no basis for appellees' assertion (Br. 50) that the Line Item Veto Act permits the President to "undo part of what Congress has just done," or to "decid[e] that a part of a law that he has just signed shall not be executed." As we explain above and in our opening brief (at 30-31), Congress retains the power to determine, with respect to each appropriations law, whether and to what extent the provisions of the Act will apply. Read against the backdrop of the Line Item Veto Act, an appropriations law that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item that is subject to the Act. See Gov't Br. 50.[15]

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[15] Appellees' contention that cancellation of budgetary items prevents the faithful execution of the laws is particularly untenable in light of the manner in which appropriations laws have been construed and administered since the ICA was enacted in 1974. Prior to the Line Item Veto Act, the question whether a particular appropriation was permissive or mandatory was governed not only by the language of the appropriations law itself, but by the background rules established by

Thus, an "A-B-C bill" (Appellee Br. 25) will be construed, absent express contrary language, to mean that "the President may either spend, or cancel, each of the items A, B, and C." The President's cancellation of an item therefore does not "undo" any portion of the appropriations law, nor does it reflect a decision that part of the law "shall not be executed." Rather, the possibility of cancellation is an integral feature of the appropriations law from the moment it is enacted. Cancellation of budgetary items pursuant to the Act is therefore a faithful execution of the laws, not a repeal or abrogation thereof.[16]

The fact that the President's cancellation of spending items is irrevocable does not transform cancellation authority into a power of statutory repeal. There is nothing novel about federal laws whose provisions may be rendered permanently inoperative by presidential action. For example, the Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.*, provides that the President "by proclamation may terminate this Act." 50 U.S.C. App. 2166(b)(1). Similarly, the Agricultural Adjustment Act, 7 U.S.C. 601 *et seq.*, provides that it "shall cease to be in effect" if the President "finds and proclaims" that a national agricultural emergency "has been ended." 7 U.S.C. 613. See also, *e.g.*, 22 U.S.C. 1965 (joint resolution

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the ICA. The Line Item Veto Act, which is part of the ICA, simply changed the background rules.

[16] The Controlled Substances Act, for example, permits the Attorney General to add and remove substances from the list of controlled substances specified in the statute. See 21 U.S.C. 811(a)(1)-(2), 812; *Touby* v. *United States*, 500 U.S. 160, 162 (1991). As a result, the Executive Branch can engage in the kind of post-enactment "A-B-C" adjustments to which appellees object. This Court nevertheless has held that the existence of the Executive Branch's discretion over the contents of the controlled substances list does not render the Controlled Substances Act unconstitutional. See *Touby*, 500 U.S. at 164-169.

authorizing economic and military aid to Middle Eastern nations "shall expire" when President determines that peace and security in Middle East are adequately assured); Act of June 10, 1933, ch. 55, § 1, 48 Stat. 119 (law authorizing Reconstruction Finance Corporation to engage in specified loan and stock transactions may be "declared no longer operative" by President).

5. Contrary to appellees' contention (Br. 41 n.26, 42), the cancellation of limited tax benefits (see ICA § 1021(a)(3) (2 U.S.C. 691(a)(3)); J.S. App. 33a) is also a form of discretionary administrative authority, not a statutory repeal. This Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges," *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989), and Congress has frequently vested the President with discretionary authority over the imposition of taxes. See, *e.g.*, *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 405-410 (1928) (rejecting nondelegation challenge to "flexible tariff" provisions of Tariff Act of 1922); *Field* v. *Clark*, 143 U.S. at 682-693 (rejecting nondelegation challenge to similar provision of Tariff Act of 1890 and citing many similar statutes). The President's authority to cancel limited tax benefits is governed by "intelligible principles." Because the provisions subject to cancellation will affect very small numbers of taxpayers, see ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a, the President has no wide-ranging authority to reshape the basic corpus of federal tax law. Cancellation of a limited tax benefit, moreover, does not subject the affected taxpayers to a special disability; it simply ensures that their tax liability is gov-

erned by the generally applicable requirements imposed by the remainder of the Internal Revenue Code.[17]

Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken. Contrary to appellees' suggestion (Br. 41 n.26), the unexplained absence of a severability provision hardly makes it "evident" (*Buckley*, 424 U.S. at 108) that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

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[17] To the extent there may be differences between expenditures and taxation for nondelegation purposes, however, they simply reinforce the conclusion that the constitutionality of each of the Act's provisions should ultimately be resolved in litigation involving a party whose interests are concretely affected by a particular cancellation.

For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

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